HENG POH KEAT & ANOR

v.

APHISSIT SAE WONG

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 12-02-97]
23 JANUARY 2001

DAMAGES: *Quantum - Private hospital - Treatment in private hospital instead of public hospital at own risk - Whether may claim expenses incurred in private hospital in full - Whether only entitled to one-third of bill*

DAMAGES: *Personal Injuries - Loss of future earnings - Student at time of accident - Section 28A(2)(c) Civil Law Act 1956 - Whether earning before injury*

The appellants appealed against the quantum of damages awarded by the Sessions Court. In particular, the first appellant claimed medical costs incurred at a private hospital after he discharged himself from a government hospital on an "at own risk" basis. He also claimed damages for loss of prospective earnings because the accident disrupted his studies and postponed his graduation by one year.

Held:

[1] There are two judicial views on a plaintiff's entitlement to claim costs of treatment at a private hospital. The first view is that where a plaintiff has admitted himself to a private hospital (instead of a government hospital) without reasonable cause, he is entitled to claim only one-third of the full medical expenses incurred at the private hospital. The second view is that the plaintiff is at liberty to choose either a government hospital or a private hospital and to claim the whole amount of the medical expenses incurred. The first view is the better view because it is in line with the principle that a plaintiff is under a duty to mitigate his loss.

[2] Section 28A(2)(c)(i) of the Civil Law Act 1956 stipulates the condition that in order to be entitled to claim for loss of future earnings, the claimant must be receiving earnings at the time before his injury happened. As the first appellant was only a student at the time of the accident, his appeal in respect of prospective earnings had to be dismissed.

[3] In the present case, although laparotomy was done on the first appellant, the injury was minor. There was no removal of any organ and he did not have to undergo multiple operations. There was no evidence that he was under considerable pain at any point of time. Hence, the award of the Sessions Court judge was fair.

[Appeal of first appellant allowed in part with costs; appeal of second appellant allowed with costs.]

Case(s) referred to:
Chong Kam Siong v. Herman Baharuddin [1995] 2 CLJ 413 ***(not foll)***
Harcharan Singh Saudagar Singh v. Hassan Ariffin [1990] 2 CLJ 393 ***(refd)***
Mahalingam Varathan v. Chan Chee Tuck [1987] 2 MLJ 20 ***(refd)***
Maimunah Hassan & Anor v. Marimuthu & Anor [1992] MMD December 1571 ***(refd)***
Ng Aik Kian & Anor v. Sia Loh Sia [1997] 2 CLJ Supp 218 ***(refd)***
Perganathan Karpaya v. Choong Yuk Sang & Anor [1996] 1 CLJ 622 ***(refd)***
Puspawangi Hassan v. Chou Hau [1993] 1 CLJ 289 ***(refd)***
Tang Sia Bak v. Mooi Kim Ming & Anor (Supreme Court Civil Appeal No: 249-87) (unreported) ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c)

For the appellants - Badev Singh Bhar; M/s Baldev Bhar
For the respondent - En Mazlan; M/s Abdul Halim Said

Reported by Yow Ting Fong

JUDGMENT

Hishamudin Yunus J:

This is an appeal by the plaintiff against the decision of the learned Sessions Court Judge, Sungai Petani, in a running down matter. The learned Sessions Court Judge had given judgment in favour of the plaintiffs (who are now the appellants) and had awarded special and general damages. The appeal that is now before me only concerns the quantum of the awards.

The first plaintiff, Heng Poh Keat, was the rider of a motorcycle and the second plaintiff, Teoh Lee Ping, was the pillion rider. The defendant was the driver of a motor van. A collision occurred between the plaintiffs' motorcycle and the defendant's van on a trunk road near Tikam Batu.

Both the plaintiffs suffered injuries and they sued the defendant for negligence.

On the issue of liability, the plaintiffs obtained judgment in default against the defendant. The lower court then held a hearing to assess damages.

But the plaintiffs were not satisfied with the damages as assessed by the Sessions Court.

I shall first deal with the appeal by first plaintiff. The appeal by the first appellant/first plaintiff is against the following items of claims that were allowed or disallowed by the Sessions Court following the assessment of damages:

(1) **Special damages:**

(a) claim for medical expenses; and

(b) claim for cost of repair to first plaintiff's motorcycle.

(2) **General damages:**

(a) claim for loss of prospective earnings; and

(b) claim for intra abdominal injury

I shall now deal with the claims item by item.

(1)(a) Claim For Medical Expenses

There is a claim by the first plaintiff for RM8,300 as being medical expenses incurred by him for treatment at a private hospital in Butterworth known as the "Bagan Specialist Centre" (the "BSC"). Originally, the first plaintiff, on the day of the accident (8 December 1992), was admitted to the Sungai Petani Government Hospital. On the following day, against doctors' advice, he discharged himself and had himself admitted at the BSC. He was discharged from the BSC on 19 December 1992 but was readmitted on 23 February 1993 for bone grafting, and discharged from the BSC on 26 February. The learned Sessions Court Judge allowed but only up to one-third of the amount of RM8,300 claimed on the grounds:

> ... memandang cara plaintif discharge dirinya daripada Hospital Kerajaan dengan sukarela; dan rawatan di Hospital Kerajaan juga adalah setaraf dengan di hospital swasta.

Encik Baldev, the learned counsel for the plaintiffs, at the hearing of this appeal argued that the first plaintiff discharged himself from the Government Hospital at Sungai Petani because he was given "bad treatment" there. With respect, there is nothing in the evidence to substantiate this allegation. On the contrary, the medical report from the Sungai Petani hospital shows that, upon admission, the first plaintiff was attended to by one Dr. Gerard F.A. Danasamy, an X-ray was done, and the nature of the injuries – which were quite serious – was diagnosed (fracture of right thigh bone and crack fracture of right radius

and ulna). The first plaintiff was due to be given the traction of Thomas Splint, and plaster of Paris for right forearm; but he took an "AOR" (at own risk) discharge the very next day.

The learned counsel for the plaintiffs also submitted that, even if the first plaintiff did not have any good reason for leaving the Government hospital in preference of a private hospital, nevertheless, he has the right of choice and was entitled to seek treatment at the latter establishment; and, therefore, he should be awarded the full amount of RM8,300 incurred by him at the BSC. Now, on this issue, there are two differing judicial views. First, there is a line of authorities subscribing to the view that where the plaintiff had himself admitted to a private hospital (instead of a Government hospital) without reasonable cause, he is entitled to claim only one-third of the full medical expenses incurred at the private hospital. This principle was applied by the courts in:

(a) *Harcharan Singh Saudagar Singh v. Hassan Ariffin* [1990] 2 CLJ 393;

(b) *Perganathan Karpaya v. Choong Yuk Sang & Anor* [1994] 1 CLJ 622; and

(c) *Ng Aik Kian & Anor v. Sia Loh Sia* [1997] 2 CLJ Supp 218.

It has been said that the above "one-third rule" has its origins in the unreported Supreme Court case of *Tang Sia Bak v. Mooi Kim Ming & Anor* (Supreme Court Civil Appeal No. 249-87). But in that case there was no written judgment and one does not know the reason why the Supreme Court reduced the amount awarded by the High Court (from RM5,576 to RM1,500) in respect of the claim for medical expenses incurred by the plaintiff at a private hospital. Thus, one can only speculate as to why the award was reduced by the Supreme Court. With respect, since the Supreme Court in that case did not deliver any written judgment, I do not think that any binding principle can be abstracted from that case. Be that as it may, the one-third rule appears to be favoured by the majority of the reported cases.

The other view is what I shall call the "freedom of choice" rule. According to this principle, the plaintiff, in seeking treatment in respect of the injury caused by the defendant, is at liberty to choose either a Government hospital or a private hospital. He does not have to give any justification should he choose the latter for treatment, and he is entitled to claim the **whole** amount of the medical expenses incurred at the private hospital. This principle was applied by the High Court of Johor Bahru in *Chong Kam Siong v. Herman Baharuddin* [1995] 2 CLJ 413.

In my judgment, the majority approach (ie, the one-third rule) is the better view (notwithstanding the misconception about the effect of the Supreme Court decision in *Tang Sia Bak*) because such a rule is in line with the principle that a plaintiff is under a duty to mitigate his loss.

Accordingly, I had dismissed the appeal in respect of this item.

(1)(b) Claim For Cost Of Repair To First Plaintiff's Motorcycle

The learned Sessions Court Judge had disallowed this claim. However, at the hearing of this appeal, the claim of RM200 by the first plaintiff was conceded to by the learned counsel for the defendant. I therefore allowed the appeal in respect of this item but only up to the agreed amount of RM200.

(2)(a) Claim For Loss Of Prospective Earnings

This claim too was dismissed by the learned Sessions Court Judge.

The first plaintiff at the time of the accident (December 1992) was undergoing a diploma course in material engineering at an institution, known as "IKTAR" (no evidence being led to show what this acronym means), in Kuala Lumpur. He was then in his first semester. It was said in evidence that because of the injuries caused by the accident his studies was disrupted and his graduation would be delayed by one year. Therefore, he would lose one year of prospective earnings. At the time of the hearing before the lower court (October 1996), the first plaintiff has yet to graduate. Evidence was given to show that an engineer, with the qualification that the plaintiff would be getting upon the completion of his course, would be getting a salary of RM1,500 per month. The first plaintiff claims for the loss of salaries of 12 months.

The learned counsel for the defendant, Encik Mazlan, opposed the claim on the ground that the first plaintiff was only a student and was not earning prior to the accident. Section 28A(2)(c) of the Civil Law Act 1956 states:

> (2) In assessing damages under this section:
>
> (a) ...
>
> (b) ...
>
> (c) in awarding damages for loss of future earnings the Court shall take into account:
>
> (i) ... damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury **and was receiving earnings** by his own labour or other gainful activity **before he was injured**. (emphasis added.)

The above provision, in particular, the words that I have emphasised, stipulates a condition in that, in order to be entitled to claim for loss of future earnings, the claimant must be receiving earnings at the time before the injury happened. In my judgment, as there is no dispute that the first plaintiff was not earning but was a mere student at the time of the accident, para. (c)(i) of sub-s. (2) of s. 28A above clearly precludes him from making a claim under this item. Accordingly, the appeal in respect of prospective earnings was dismissed.

(2)(b) Claim For Intra Abdominal Injury

For this injury, the Sessions Court awarded the first plaintiff RM7,000.

The first plaintiff claims for RM22,000 citing *Puspawangi Hassan v. Chou Hau* [1993] 1 CLJ 289. In this case cited, the plaintiff was awarded RM44,000. The learned High Court Judge justified the award in the following manner:

> (3) Intra Abdominal Injury
>
> Pihak plaintiff telah membahagikan item ini kepada empat. Mahkamah berpendapat bahawa gantirugi untuk ini dijadikan satu item sahaja sebagaimana yang disenaraikan oleh Dr. T. Kumar dengan mengambil kira huraian yang dibuat oleh Doktor Pakar dalam "AB2". Dengan mengambil kira juga kecacatan-kecacatan yang terdapat:
>
> (i) Parut akibat daripada pembedahan laporotomy;
>
> (ii) Fallopian tube sebelah kiri telah rosak dan dibuang – mungkin mengakibatkan peluang mengandung untuk plaintiff berkurangan.
>
> (iii) Lacerations over both ovaries with haemorrhage and a large retro peritoneal haematoma.
>
> Saranan yang dibuat oleh kedua-dua pihak adalah tidak munasabah dan Mahkamah membuat keputusan untuk abdominal injuries sebagaimana yang dinyatakan oleh doctor dan Doktor Pakar dalam kes ini. Gantirugi sebanyak RM44,000 adalah munasabah.

The first plaintiff also relied on *Mahalingam Varathan v. Chan Chee Tuck* [1987] 2 MLJ 20 where the High Court awarded the plaintiff RM30,000. In this case a laparotomy was performed and the plaintiff was found to have a perforation of the small intestine. The repair was done but post operatively the wound in the small intestine became infected and was gaping; and the abdomen was swollen. The plaintiff went for two further operations. However, the swollen abdomen persisted for a long time. Normal intake of food was delayed. The plaintiff was under considerable pain and suffering.

The learned counsel for the respondent/defendant, on the hand, cited *Maimunah Hassan & Anor v. Marimuthu & Anor* Mallal's Digest, (Dec 92) Damages (Personal injuries or Death) 1571, where the High Court awarded the plaintiff RM8,000 for spleenectomy (removal of spleen).

In the present case, although laparotomy was done on the first plaintiff, the injury was minor in nature, as can be seen from the specialist reports. There was no removal of any organ (such as spleen or fallopian tube). It was merely for retro-peritoneal haematoma. The first plaintiff did not have to undergo multiple operations. Indeed, there was also no evidence that the first plaintiff was at any point of time under considerable pain or suffering. Dr Lau Chun Cheong, Orthopaedic Surgeon at the BSC in his report states:

> Abdominal exploration on 9/12/92 showed retro-peritoneal haematoma. There were no other injuries.

And Dr John J. Anantham, the Consultant Orthopaedic Surgeon, at the Pusat Pakar Utara states in his report:

> **Abdomen**
>
> A 9cm right paramedian surgical scar is noted. The abdomen is otherwise normal.

Dr John also noted that the surgical scar had healed.

In my judgment, the award of the learned Sessions Court Judge was fair as the injury to the abdomen was minor in nature as compared to the injuries sustained or sufferings undergone by the plaintiffs in the cases cited by both Encik Baldev and Encik Mazlan, where the awards were very much higher. Moreover, the award of RM7,000 comes quite close to the award of RM8,000 in *Maimunah* where, unlike the present case, there was a removal of the spleen.

I shall now move on to the appeal of the second plaintiff, Teoh Lee Ping. Her appeal is in respect of:

(1) loss of income;

(2) award for future operation

(1) Loss Of Income

Just before the accident, the second plaintiff was working at a photo studio and was paid daily by her employer at the rate of RM12 per day. After the accident, she was not able to work for four months because of her injuries. She was claiming loss of earnings for four months at the rate of RM360 per month.

Her claim was rejected by the learned Sessions Court Judge.

At the hearing of this appeal, the learned counsel for the respondent, conceded to the claim. Accordingly, I allowed the appeal in respect of this item.

(2) Award For Cost Of Future Operation

The second plaintiff, according to the specialist report, would have to undergo another operation in the near future to remove an intramedullary nail used to stabilise the fracture to her right femur, as the nail was excessively long and irritates the gluteal tissues, restricting and making hip movements uncomfortable and painful.

The learned Sessions Court Judge, in his grounds of judgment, admitted that, in his decision, he had inadvertently omitted to make any award in respect of this item of claim. However, in his grounds, he opined that an award of RM5,000 would be fair and reasonable.

At the hearing of this appeal, both Encik Baldev and Encik Mazlan agreed to this amount and I accordingly, allowed the appeal (ie, RM5,000) in respect of this item.

Finally, there is an appeal by both the appellants against the award of interest of 6% in respect of the general damages awarded by the lower court. At the hearing of the appeal before me, the learned counsel for the appellants withdrew this particular item of appeal.

The appellants were awarded costs.